Lipp Engineering Sdn Bhd v How Thong Construction & Civil Engineering Sdn Bhd

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22NCVC-390–07 OF 2016
ABDUL MAJID JC
31 JANUARY 2017

Civil Procedure — Summary judgment — Application — Plaintiff claimed for balance sum of six portable water storage supplied to defendant — Whether there was triable issue — Whether there was merit or bona fide defence by defendant

The plaintiff sought a sum of RM1,015,462.44 with interest from the defendant for the balance sum of six portable water storage ('the tanks') supplied to the defendant. The defendant contended that the tanks had been leaking and the plaintiff had failed to conduct repair works to the defendant's satisfaction. As such, the plaintiff was not entitled to the full payment of the contract sum. In response, the plaintiff submitted that it had fulfilled its part under the contract and in fact the defendant's employer had certified the completion of the installation of all the six tanks by issuing the 'The testing & Commissioning' form for each tank and thus, entitled to the balance sum. The plaintiff also denied that the leaking was attributable to any negligence or defects in its workmanship. The plaintiff applied for summary judgment ('encl 7') under O 14 of the Rules of Court 2012 and contended that there was no merit or bona fide defence by the defendant. In this regards, the plaintiff stated that the water tanks had been surrendered to Rapid — PMC OSM who was the owner of the Petronas Rapid Project.

Held, dismissing encl 7 with costs:

(1) This was not a simple case of goods sold and delivered. There were issues raised by the defendant as well as the plaintiff, inter alia, defective of the tanks, extent of the plaintiff's obligations under the contract, effect of testing and commissioning certification, handover of the tanks, and retention sum of 5% ('the said issues'). The said issues were triable issues which could not be dealt with summarily. The remarks found in all the five forms of 'Testing & Commissioning' clearly indicated that the tanks were not handed over yet (see para 10).

[Bahasa Malaysia summary

Plaintif memohon jumlah sebanyak RM1,015,462.44 dengan faedah daripada defendan bagi baki jumlah enam penyimpanan air mudah alih ('tangki-tangki tersebut') yang dibekalkan kepada defendan. Defendan berhujah bahawa

tangki-tangki tersebut telah bocor dan plaintif telah gagal untuk menjalankan kerja-kerja membaiki untuk memuaskan defendan. Oleh itu, plaintif tidak berhak kepada bayaran penuh daripada jumlah kontrak. Dalam menjawab, plaintif berhujah bahawa ia telah memenuhi bahagiannya di bawah kontrak dan sebenarnya majikan defendan telah mengesahka siapnya pemasangan kesemua kenam-enam tangki dengan mengeluarkan borang 'The testing & Commissioning' bagi setiap tangki dan oleh itu, berhak kepada jumlah baki. Plaintif juga menafikan bahawa kebocoran adalah disebabkan kepada apa-apa kecuaian atau kecacatan dalam kerja buatannya. Plaintif memohon untuk penghakiman ringkas ('lampiran 7') di bawah A 14 Kaedah-Kaedah Mahkamah 2012 dan berhujah bahawa tidak terdapat merit atau pembelaan bona fide oleh defendan. Berkenaan tersebut, plaintif menyatakan bahawa tangki-tangki air tersebut telah diserahkan kepada Rapid — PMC OSM yang mana adalah pemilik Projek Rapid Petronas.

Diputuskan, menolak lampiran 7 dengan kos:

(1) Ini bukanlan kes biasa mengenai barangan yang dijual dan dihantar. Terdapat isu yang dibangkitkan oleh defendan dan juga plaintif, antara lain, kecacatan tangka, sejauh mana tanggungjawab plaintif di bawah kontrak, kesan pengujian dan sijil pentauliahan, penyerahan tangki-tangki, dan jumlah tahanan sebanyak 5% ('isu-isu tersebut'). Isu-isu tersebut adalah isu yang boleh dibicarakan yang tidak boleh diuruskan secara ringkas. Kenyataan yang didapati di dalam kelima-lima borang 'Testing & Commissioning' jelas menunjukkan bahawa tangki-tangki belum diserahkan lagi (lihat perenggan 10).]

Notes

For a case on application, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) para 9865.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)
Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd [1995] 2 MLJ 363; [1995] 3 CLJ 690, CA (refd)
National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300; [1984] 1 CLJ Rep 283, FC (refd)
South East Asia Insurance Bhd v Kerajaan Malaysia [1998] 1 CLJ 1045, CA (refd)

Legislation referred to

Rules of Court 2012 O 14, O 14 r 1

Andrew Chan (KY Soo) for the appellant.
Mallika Lee (Mallika & Lim) for the respondent.

Abdul Majid JC:

INTRODUCTION

[1] The plaintiff applied for a summary judgment vide encl 7 ('the application') and having heard the submissions from both parties I dismissed the application with costs. The plaintiff now appeals against the said decision.

THE APPLICATION

[2] The plaintiff seeks a sum of RM1,015,462.44 with interest from the defendant for the balance sum of the six portable water storage ('the tanks') supplied to the latter.

[3] The defendant does not dispute the contract and the terms it has entered with the plaintiff. However, what is disputed is that the tanks have been leaking and the plaintiff has failed to conduct repair works to the satisfaction of the defendant. Hence, the defendant is contending that the plaintiff is not entitled to the full payment of the contract sum.

[4] On the other hand, the plaintiff is contending that it has done its part under the contract and in fact the defendant's employer had certified the completion of the installation of all the six tanks by issuing the 'Testing & Commissioning' form for each tank and therefore, entitled to the balance sum. The plaintiff denied the leaking was attributable to any negligence or defects in its workmanship.

[5] In contending that there is no merit and bona fide defence the plaintiff is saying that the water tanks have been surrendered to Rapid — PMC OSM who is the owner of the Petronas Rapid Project.

THE LAW ON SUMMARY JUDGMENT

[6] Order 14 r 1 states:

> Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part thereof except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.

[7] In *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 1 CLJ Rep 283, George Seah FJ at p 201 (MLJ); p 285 (CLJ) stated:

We think it appropriate to remind ourselves once again that in every application under O 14 the first considerations are: (a) whether the case comes within the Order; and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O 14. For the purposes of an application under O 14 the preliminary requirements are:

(i) the defendant must have entered an appearance;

(ii) the statement of claim must have been served on the defendant; and

(iii) the affidavit in support of the application must comply with the requirements of r 2 of the O 14.

It is to be observed that a case is not within O 14: (a) where no statement of claim has been served on the defendant; (b) where the indorsement on the writ includes a claim or claims outside the scope of O 14 as coming within r 1(2); (c) where the affidavit in support of the application is defective, eg in omitting to state the deponent's belief that there is no defence to the claim or part to which the application relates; (d) where the application is made in an action against the government (O 73 r 5(1)).

If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the court why judgment should not be given against him (see O 14 r 3 and 4(1)).

Further down at p 303 (MLJ); p 287 (CLJ), the learned judge continued:

In *Gold Ores Reduction Co v Pain* [1892] 2 QB 14 it was held that for the purpose of O 14 application the statement of claim must be complete and good in itself; any defect or omission cannot be corrected or supplemented by the plaintiff's affidavit. Furthermore, if the defect is one of substance, the application for summary judgment will be dismissed (see *Sheba Gold Mining Co v Trubshawe* [1892] 1 QB 674).

[8] As to defence to such application, the Court of Appeal in *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363; [1995] 3 CLJ 690 Mahadev Shanker JCA held at p 367 (MLJ); p 693 (CLJ):

When an application is made for summary judgment under O 14 supported by an affidavit which goes to show that there is no defence, the defendants must show cause why leave to defend must be given. This means that the defendants must provide answers on oath which constitute evidence that they have a defence which is fit to be tried. Denials in a defence do not constitute evidence. They are challenges to the other side to show proof. In the present case the guarantors do not appear to have appreciated this. Their affidavits merely relied on the defence they pleaded, which consists of bare denials and points of law which they could not sustain.

[9] A clear guide on summary judgment is well illustrated in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, Mohamed Azmi SCJ said at

p 408:

> In our view, basic to the application of all those legal propositions, is the requirement under O 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. On the treatment of conflict of evidence on affidavits, Lord Diplock speaking in the Privy Council on *Eng Mee Yong & Ors v Letchumanan* 5 had this to say at p 217:
>
> > Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.
>
> Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a judge has to decide a case or matter on affidavit evidence.
>
> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.
>
> Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand' (see *Cow v Casey* 6 and *European Asian Bank AG v Punjab & Sind Bank* 7 at p 516).

In *South East Asia Insurance Bhd v Kerajaan Malaysia* [1998] 1 CLJ 1045 Shaik Daud Ismail JCA at p 1048 held:

> It is well settled that if a defendant in an O 14 application succeeds in raising even a single triable issue, it will not be a fit case and proper case to order summary judgment. It is only in plain and obvious cases where there are no issues to be tried should recourse be had to O 14.

DECISION

[10] To my mind this is not a simple case of goods sold and delivered. There are issues raised by the defendant as well as the plaintiff, inter alia:

a) defective of the tanks;

b) extent of the plaintiff's obligations under the contract;

c) effect of testing and commissioning certification;

d) handover of the tanks; and

e) retention sum of 5%.

The issues mentioned earlier clearly to my mind are triable issues which could not be dealt with summarily. The remarks found in all the five forms of 'Testing & Commissioning' clearly indicated that the tanks were not handed over yet. I therefore, dismissed the application in encl 7 with costs.

Enclosure 7 dismissed with costs.

Reported by Dzulqarnain Ab Fatar